COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

15-P-940

FRANCES A. AMARA & another[1]

vs.

FALCON HOLDING CORP.[2]

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Frances Amara (Amara) and Anthony Amara (collectively, the plaintiffs), appeal from the summary judgment entered on their slip and fall negligence claim. This case presents issues relating to the evolving "mode of operation" basis for premises liability. The motion judge, ruling without the benefit of the Supreme Judicial Court (SJC) decisions in Bowers v. P. Wile's, Inc., 475 Mass. 34 (2016), or Sarkisian v. Concept Restaurants, Inc., 471 Mass. 679 (2015), dismissed the complaint on the ground that "[t]his is not a 'mode of operation' case." We agree, and thus affirm.

Background. Amara attended a conference at a Sheraton Hotel owned by the defendant holding company (Falcon). There was one single-room restroom accessible from the conference

[1] Anthony Amara.

[2] General partner of the Picknelly Family Limited Partnership.

room, which the attendees used throughout the day. In her second trip to the restroom, Amara slipped and fell on the ceramic floor, sustaining injuries. She placed her hands on the floor to get up, and her hands became very wet from a foamy substance. She also noticed the smell of something akin to furniture polish. After she reported her fall, Sheraton personnel noticed an oily substance on the bathroom floor and the smell of furniture polish. A can of furniture polish, labeled "Radiance," was located in a cabinet beneath the sink of the bathroom, "without a cap and dripping product." This lawsuit ensued.

Discussion. Amara contends that the judge erred in finding that the "mode of operation" approach to premises liability did not apply to the present case. Relying on the statement of a Sheraton housekeeping supervisor,[3] she posits that a recent previous patron of the restroom, thinking the bottle contained room freshener, had sprayed the polish, which landed on the floor and created a very slippery surface. She argues that the hotel was negligent for leaving the can, which could be mistaken for room freshener, in a place easily accessible by members of the public using the restroom. She further claims that the use

[3] The Sheraton housekeeping supervisor told Amara that "the can of Radiance spray furniture polish was what was used to spray in the bathroom as freshener that got on the floor."

of the furniture polish as a room freshener was reasonably foreseeable. We disagree.

"We review a grant of summary judgment de novo to determine whether, viewing the evidence in the light most favorable to the nonmoving party, all material facts have been established and the moving party is entitled to judgment as a matter of law." Galenski v. Erving, 471 Mass. 305, 307 (2015). Bare assertions made in the nonmoving party's opposition will not defeat a motion for summary judgment. See O'Rourke v. Hunter, 446 Mass. 814, 821-822 (2006).

Massachusetts has generally followed the traditional approach to premises liability. That approach provides that "[a] possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and (c) fails to exercise reasonable care to protect them against the danger." Sarkisian, 471 Mass. at 682, quoting from Restatement (Second) of Torts § 343 (1965). The instant case hinges on the first element, under which a plaintiff must demonstrate that the owner of the premises had actual or constructive notice of an unsafe

condition. See Sheehan v. Roche Bros. Supermkts., Inc., 448 Mass. 780, 782-783 (2007). In the context of "spillage" cases, this notice requirement "is satisfied if the operator of that business 'caused [the] substance, matter, or item to be on the floor; the . . . operator had actual knowledge of its presence; or the substance, matter, or item had been on the floor so long that the . . . operator should have been aware of the condition.'" Sarkisian, supra, quoting from Sheehan, supra. In the present case, there is no dispute that Amara cannot satisfy the notice element under the traditional theory of premises liability.[4] Amara maintains, however, that her claim should be viewed under the mode of operation approach,[5] and that, under such an approach, summary judgment should not have been granted.

The mode of operation approach "refined the Restatement's notice requirement in a narrow subset of premises liability cases." Sarkisian, 471 Mass. at 683. "The mode of operation

[4] Amara does not contend that the traditional approach to premises liability applies to the present case. Moreover, there is no evidence in the summary judgment record that Falcon had actual notice of the wet or slippery floor. Although constructive notice can be established by evidence indicating the length of time a hazard existed, Oliveri v. Massachusetts Bay Transp. Authy., 363 Mass. 165, 166 (1973), Amara does not claim that Falcon sprayed the cleaner in the bathroom, or had any knowledge of how long the cleaning product was on the bathroom floor, or had sufficient time to recognize and remedy the condition.

[5] At oral argument, the plaintiffs argued that the key consideration is foreseeability, regardless of whether the approach is labeled "mode of operation," "negligent storage," or otherwise.

approach recognizes that a proprietor's manner of operation can create foreseeable hazards that might arise through the actions of third parties, thus obligating the proprietor to take all reasonable precautions necessary to protect against those foreseeable hazards." Bowers, 475 Mass. at 38-39, citing Sheehan, 448 Mass. at 786. The SJC, however, has limited the application of this approach by "requir[ing] a plaintiff to establish a 'particular' mode of operation that makes the hazardous condition foreseeable, and a 'recurring feature of the mode of operation,' rather than one where the risk only 'conceivabl[y]' could arise from the mode of operation." Bowers, supra at 41, quoting from Sarkisian, supra at 684, 687. A brief review of SJC case law explains the applicability and limitations underlying the mode of operation approach to premises liability.

In Sheehan, a case where a grocery store patron slipped on a grape, the SJC adopted the mode of operation approach. 448 Mass. at 788. The court noted that the grapes were "packaged in individually sealed bags, easily opened by the hand," and thus were susceptible to spillage by customers. Id. at 781. Under the mode of operation approach, the court observed, "[A] store owner could be liable for injuries to an invitee if the plaintiff proves that the store owner failed to take all reasonable precautions necessary to protect invitees from these

foreseeable dangerous conditions." Id. at 786. The SJC explicitly limited the scope of its holding, however, stating that adopting the mode of operation methodology "does not make the owner of [business premises] an insurer against all accidents." Id. at 790.

In Sarkisian, the SJC expanded the mode of operation approach beyond self-service establishments, applying it in the circumstance where patrons purchased "beverages in plastic cups from bars located on a dance floor," and the drinks spilled, making the dance floor slippery. 471 Mass. at 686. The court noted however, that "Sheehan limited the mode of operation approach to situations where a business should reasonably anticipate that its chosen method of operation will regularly invite third-party interference resulting in the creation of unsafe conditions, and a visitor suffers an injury after encountering the condition so created" (emphasis added). Id. at 684.

In Bowers, the defendant installed a six-foot wide gravel area comprised of "river stones" adjacent to a walkway. The defendant "display[ed] landscaping merchandise for sale in this area, and customers [could] help themselves to products there." 475 Mass. at 36. The plaintiff slipped on a river stone on the walkway and suffered a displaced fracture of her right hip. Id. at 37. The SJC held that "there [was] a disputed question of

fact whether [the defendant's] choice of gravel rather than another, nonmobile surface, such as the grass it had considered for its self-service area, which is adjacent to the walkway leading to the main entrance to the store, represents a 'particular' mode of operation of the self-service area that makes the recurring hazard of stones on the walkway, after customers have walked through the self-service area, foreseeable." Id. at 41-42. Although "[t]he gravel area had been in place for fifteen years without any previous complaints of a customer having fallen due to the presence of the stones . . . [the defendant] was aware that stones could be dislodged by people walking in the gravel area, and could end up on the walkway, creating a potential tripping hazard." Id. at 37.[6] Furthermore, the SJC reiterated that a plaintiff must establish a "particular" mode of operation that makes the hazardous condition a "recurring feature of the mode of operation," rather than one where the risk only "conceivabl[y]" could arise from the mode of operation. Id. at 41, quoting from Sarkisian, 471 Mass. at 684, 687.

[6] In Bowers, the defendant, according to its manager, viewed potential dislodging of stones as a potential tripping hazard. 475 Mass. at 37 n.7. Indeed, the defendant store "maintained an informal policy of having employees check the walkway whenever an employee was outside assisting a customer in the gravel area . . . at least in part due to concerns that stones might come to rest on the walkway as a result of customers walking in and around the gravel area." Id. at 42.

In the present case, the summary judgment record is devoid of evidence of any prior complaints about the bathroom's condition, or any complaints or evidence of prior or potential use of polish as room freshener. Moreover, unlike the cases cited above, there was no evidence that the alleged storing of a cleaning product in a cabinet beneath a sink was a recurrent condition that had or would "regularly invite third-party interference resulting in the creation of unsafe conditions." Sarkisian, supra at 684, citing Sheehan, 448 Mass. at 791. Contrast Bowers, 475 Mass. at 42 (evidence in record that defendant had notice of potential dislodging of stones causing potentially dangerous condition). Thus, the plaintiffs did not establish foreseeability within the meaning of Bowers, Sarkisian, and Sheehan.

We discern no genuine issue of material fact supporting the claim that Falcon's purported mode of operation was a "recurring feature" rather than only a "conceivabl[e]" risk. Bowers, supra at 41.[7] Accordingly, on the facts of this case, the mode of

[7] We are not persuaded by the plaintiffs' claim that Falcon's relocation of the can of polish after Amara's fall demonstrates prior knowledge of a dangerous condition. See generally Hubley v. Lilley, 28 Mass. App. Ct. 468, 474 (1990) (evidence of postaccident safety improvements not admissible to prove negligence).

operation approach does not apply.

Judgment affirmed.

By the Court (Blake, Kinder & Neyman, JJ.[8]),

Joseph F. Stanton

Clerk

Entered: August 29, 2016.

[8] The panelists are listed in order of seniority.